Nos. 02-241, 02-516

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In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, *et al.*,

Respondents,

and

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* CITY OF PHILADELPHIA, PENNSYLVANIA, CITY OF CLEVELAND, OHIO AND THE NATIONAL CONFERENCE OF BLACK MAYORS, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The City of Philadelphia, Pennsylvania ("Philadelphia"),[2] where our nation's first public school was established in 1698, is the birthplace of American education. Located in southeastern Pennsylvania, Philadelphia is a city of approximately 1.5 million people and has the seventh largest public school district in the nation, with a racially and ethnically diverse student enrollment of more than 200,000 students in its public school system. Philadelphia has taken the lead in sponsoring initiatives that attract, engage and retain students in Philadelphia and has established as its economic objective the creation of knowledge-based jobs. Each year, thousands of students graduate from Philadelphia schools seeking access to post-secondary education as a means to broaden their opportunities for meaningful careers. Philadelphia believes that participation in this case as *amicus curiae* is critical to ensuring access to higher education for all its public school students, recognizing that without these educational opportunities, Philadelphians will be ill-equipped to take advantage of the economic growth it envisions. Its political and business leaders of tomorrow will come from the ranks of those admitted to college and graduate school today.

The City of Cleveland, Ohio ("Cleveland") has the largest school district in Cuyahoga County, Ohio. Cleveland's

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[1] No counsel for any party authored any portion of this brief. No person or entity other than *amici*, members or their counsel contributed financially to the preparation and submission of this brief.

[2] Philadelphia's submission is made on behalf of its Administration and City Council, which expressed its support for such a filing in a resolution on January 28, 2003.

school system, the Cleveland Municipal School District, graduates thousands of students each year. Cleveland believes that participation in this case as *amicus curiae* is critical to ensuring access to higher education for its public school students, many of whom are African-American and Latino.

The National Conference of Black Mayors, Inc. ("NCBM"), is a nonprofit, nonpartisan 501(c)(3) service organization with a membership of approximately 500 mayors who represent over 20 million people throughout the nation. NCBM provides management and technical assistance to its members and articulates their concerns on national policy issues. NCBM as a whole, as well as its individual members, recognizes the relationship between gainful employment and higher education and thus believes that participation in this case as *amicus curiae* is critical to ensuring access to higher education for all public school students.

For decades, relying on their vast experience, colleges and universities have measured applicants from *amici*'s public schools as they do all applicants, not only by their standardized test scores, but also by countless other measures indicative of their potential to become leaders in tomorrow's society. In *amici*'s view, this type of admissions process has led to better and more inclusive leadership and greater competition in the business world.[3] *Amici* have

[3] There is a direct correlation between employment opportunities and access to post-secondary education. *See generally* NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 2001, *Ch. 5: Outcomes of Education* (2001) (indicating that high school graduates

(Continued on following page)

a significant interest in ensuring that these public and private institutions retain the institutional autonomy to continue admitting their students.

SUMMARY OF ARGUMENT

Petitioners urge this Court to hold that "the consideration of race, even if considered along with other factors, constitutes the kind of intentional discrimination that requires strict scrutiny." Brief of Jennifer Gratz et al. [hereinafter "Gratz Br."] at 38. Their argument is misguided. First, this Court's precedents do not require that holding. The Fourteenth Amendment's Equal Protection Clause is not violated when applicants to a college or university are treated as individuals, and these institutions consider applicants' individual attributes in deciding whether to admit them.

Second, this proposed "no consideration of race" rule will either have a "chilling effect" on the college and university admissions process, or require federal courts to be the admissions office of last resort for nearly every college and university. This chilling effect, ironically, would result in minority students, who despite their test scores or grades are still qualified candidates for reasons *other* than their race, being denied admission *because* of their race so that colleges and universities can avoid constitutional scrutiny of their admissions processes. Alternatively, these institutions will follow court-imposed

without a college degree were twice as likely to be unemployed as college graduates).

admissions criteria based solely on standardized test scores and grades, to the disadvantage of *amici*'s students, a majority of whom are African-American and Latino. Otherwise, rejected white applicants will inundate federal courts with lawsuits, extending the jurisdiction of Article III judges far beyond anything this Court has ever deemed permissible. This Court has always recognized that the jurisdiction of Article III judges to interfere in the academic decision-making process is rather limited, even for the purpose of vindicating rights under the Fourteenth Amendment.

The perils of Petitioners' "no consideration of race" rule are best avoided by this Court's reaffirming the wise and well-reasoned opinion issued by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Justice Powell cogently set forth a guiding principle that respects both the institutional autonomy always afforded educational institutions and the principles set forth in this Court's long-standing Fourteenth Amendment jurisprudence. Petitioners' attempts to characterize Justice Powell's opinion as departing from this latter tradition are inaccurate. In fact, it is Petitioners who ask the Court to go down a path it has to date refused to take. This Court should reject that request, and instead reaffirm the guiding principles enunciated by Justice Powell.

ARGUMENT

I. THIS COURT SHOULD REJECT PETITIONERS' PROPOSED RULE.

Two fundamental principles have guided this Court in determining whether it is required to act under the Fourteenth Amendment. First, "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (citing *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976)). Second, "[u]nlike Congress, which enjoys 'discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' federal courts have no comparable license and must always observe their limited judicial role." *Missouri v. Jenkins*, 515 U.S. 70, 113 (1995) (O'Connor, J., concurring) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966))). Petitioners' proposed rule – that this Court hold that no consideration of race is ever permitted in college and university admissions, save as a remedy for past discrimination – violates both of these fundamental principles.

In Petitioners' scheme, the proposed "no consideration of race" rule would serve both as a basis for a court finding a Fourteenth Amendment violation and as a remedy for the very same violation. In their effort to achieve both, Petitioners fail at accomplishing either. The phrase "the consideration of race" is broad and the precise contours of a "no consideration of race" rule are largely undefined. It is clear, however, from how Petitioners have presented their case that the admission of minority applicants with standardized test scores and grade point averages lower

than those of rejected white students will guarantee litigation, regardless of whether a college or university otherwise considers the individual attributes of its applicants. Colleges and universities will have everything to lose and only a lawsuit to gain by admitting *amici*'s minority students, even if their race was never considered, if those students' standardized test scores or grade point averages are lower than *any* rejected white student. By effectively requiring colleges and universities to reject minority applicants they would ordinarily accept to avoid litigation, even though race was never considered, Petitioners' "no consideration of race" rule is overly broad and thus "exceeds appropriate limits." Moreover, Article III judges will become the final arbiters of who is qualified to receive an education at nearly every college and university in the nation – whether public or private – based on as-yet undetermined criteria. Enforcing this rule will require federal judges to go far beyond "their limited judicial role." For these reasons, this Court should reject Petitioners' "no consideration of race" rule.

A. Petitioners' Proposed Rule Would Inhibit Colleges and Universities from Treating *Amici*'s Students As Individuals.

Petitioners' proposed rule does not – indeed, cannot – offer any guidance to colleges and universities in how to avoid litigation, other than to rely solely on standardized test scores and grade point averages in the selection of their students. Colleges and universities, however, should not have to rely on those two criteria alone in order to

avoid litigation under Petitioners' proposed rule.[4] The resulting chilling effect in the admissions process is ample basis for this Court to reject that rule.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. "The idea is a simple one: At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of racial, religious, sexual or national class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (citations and internal marks omitted). But nothing in the Equal Protection Clause forbids colleges and universities from evaluating all criteria it deems important to its educational mission and relevant about an individual applicant. This type of admissions process "treat[s] citizens as individuals."

Moreover, this Court has never held that any consideration of race necessarily constitutes a violation of the Equal Protection Clause. As the Court held in the context of voting:

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[4] The issue of litigation is relevant to both public and private colleges and universities. A private right of action for any acts of discrimination prohibited by the Fourteenth Amendment will exist under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, which bans any acts of discrimination practiced by educational institutions receiving federal funds. *See, e.g., United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992) ("Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment.") (citations omitted).

> The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. . . . The distinction between being aware of racial considerations and being motivated by them may be difficult to make.

Id. at 915-16 (citations omitted). As a result, in *Miller* this Court held that "[w]here [race-neutral districting principles] or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can 'defeat a claim that a district has been gerrymandered on racial lines.'" *Id.* at 916 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

In contrast, Petitioners' proposed "no consideration of race" rule allows for no such flexibility. While Petitioners suggest that the "range of factors that a university may constitutionally consider in selecting its students . . . is virtually infinite," Gratz Br. at 37, and that "there is no limit to the viewpoints, perspectives, ideas, character traits, talents, and experiences that a university might consider in assembling its community," *id.*, their proposed rule operates under a far different assumption. Instead, they declare, "the consideration of race, even if considered along with *other* factors, constitutes the kind of intentional discrimination that requires strict scrutiny." *Id.* at 38 (emphasis added). Under Petitioners' formulation, there is no sensitivity to the "complex interplay of forces" involved in admitting students to colleges and universities. There is no "distinction between being aware of racial considerations and being motivated by them." Under Petitioners'

proposed rule, the mere consideration of race, even if that was not the rationale for an institution's admissions process, "requires strict scrutiny."[5]

Petitioners show no appreciation whatsoever for the impact of their proposed rule on the admissions process. By setting the standard for determining discrimination at a level so low that any consideration of race is banned, even if it is not the dominant factor, Petitioners undermine the ability of a university to defend its admissions decisions. As long as a disappointed applicant can allege some consideration of race somewhere in the admissions process of a college or university, the admissions process must be subject to strict scrutiny and cannot "defeat a claim," as this Court contemplated in *Miller*. How could an institution that favors face-to-face interviews, for instance, or otherwise receives information revealing an applicant's race, prove that race played no factor whatsoever in accepting an applicant with test scores or a GPA lower than any rejected white applicant's? Any allegation that race was considered somewhere in the process would condemn a university to go to trial. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (reversing a judgment as a matter of law because "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge") (citation and internal marks omitted). Similarly, so long as a jury can infer that an applicant's race somehow mattered to the university,

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[5] Significantly, an institution's "consideration of race" does not equate to a quota system, and does not mean that any particular student failed to gain admission because of race.

the allegedly aggrieved applicant stands a good chance of prevailing. In the end, colleges and universities will be vulnerable to endless litigation based on the whims of disappointed applicants, rather than their measured judgment and consideration of their own interests.

Having to operate an admissions program under such conditions will have a "chilling effect" on the entire process. In *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182 (1990), this Court noted that there is just such a "chilling effect" on academic freedom where there is an effort "to control or direct the *content* of the speech engaged in by the university or those affiliated with it." 493 U.S. at 197. Petitioners concur with this proposition, citing it in support of their position, *see* Gratz Br. at 35, but apparently they are oblivious to its application to this case. Petitioners' proposed rule threatens "to control or direct the content of the speech engaged in by the university." Petitioners want to forbid colleges and universities from thinking about, talking about, or otherwise considering the race of any of its applicants or the ways in which race fits into their educational mission, no matter what form that consideration takes. The significant threat posed to academic freedom by Petitioners' proposed "no consideration of race" rule cannot be ignored.

Furthermore, this "chilling effect" will inevitably force colleges and universities to reject many of *amici*'s minority students, as these institutions try to avoid the very litigation that Petitioners' rule will spawn. *Amici*'s students will be caught in the crossfire between applicants with a penchant to sue and colleges and universities eager to minimize their exposure. In the past, these students, who may not fit Petitioners' notion of the proper academic profile, have been admitted by colleges and universities

who believed that they deserved admission for reasons having nothing to do with race, although a majority of *amici*'s students are African-American or Latino. If Petitioners' proposed rule is adopted, the spectre of litigation will result in colleges and universities denying them admission. For under Petitioners' scheme, applicants like Petitioners will be encouraged to bring lawsuits, even if the race of students such as *amici*'s was never considered.

Under Petitioners' proposed rule, colleges and universities can only ensure that they avoid litigation by adopting an admissions process based solely on standardized test scores and grade point averages. Colleges and universities, however, should not be required to "eliminat[e] a condition that does not violate the Constitution." *Milliken*, 433 U.S. at 282. Instead, Petitioners' proposed rule should be rejected for including within its purview activity both consistent with and protected by the Constitution.

B. Petitioners' Proposed Rule Would Disrupt the Delicate Balance Between Vindicating Fourteenth Amendment Rights and Interfering with the Educational Process.

This Court has always considered the Fourteenth Amendment interest in prohibiting racial discrimination with an eye to the limits of judicial competence, ever careful not to usurp the authority of educators. For example, throughout this Court's consideration of the issue of school desegregation, the Court has limited the scope, duration and reach of the Fourteenth Amendment, always stopping short of intruding into decisions about how students will best learn, the very heart of the educational process. Petitioners give no consideration to this issue at all. In fact, this Court *unanimously* ruled nearly twenty

years ago that it would not second-guess the academic decisions made by the University of Michigan. Tellingly, although Petitioners clearly want this Court to either overturn or modify this decision, there is not *one* reference to this decision in either of their briefs.

This Court's pragmatic approach in interpreting the Fourteenth Amendment reflects a profound understanding of the limits on the federal judiciary's ability to address education policy. As one member of this Court has stated:

> Unlike Congress, which enjoys discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, federal courts have no comparable license and must always observe their limited judicial role. Indeed, in the school desegregation context, federal courts are specifically admonished to take into account the interests of state and local authorities in managing their own affairs, in light of the *intrusion into the area of* education, where States historically have been sovereign, and to which States lay claim by right of history and expertise.

Jenkins, 515 U.S. at 113 (O'Connor, J., concurring) (citations and internal marks omitted) (emphasis added); *see also id.* at 133 (Thomas, J., concurring) ("Federal judges cannot make the fundamentally political decisions as to which priorities are to receive funds and staff, which educational goals are to be sought, and which values are to be taught."). In the context of higher education, these same principles apply as well as the principle of academic freedom.

Petitioners pay insufficient attention to the principle of academic freedom, perhaps hoping to gloss over its

significance in this case. *See generally* Brief of Barbara Grutter [hereinafter "Grutter Br."] (citing *no* academic freedom cases). However, this principle's relevance cannot be so easily avoided. In *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), a unanimous Court expressly rejected the notion that it – or any federal court – has the institutional expertise necessary to second-guess the complex decisions made by academics in deciding who is qualified to be a student:

> Considerations of profound importance counsel restrained judicial review of the substance of academic decisions. . . . Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, a special concern of the First Amendment. If a federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions – decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision-making.

474 U.S. at 225-26 (citations and internal marks omitted). Nowhere in their briefs do Petitioners explain how this Court now can make "decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative

decisionmaking," when this Court has unanimously held that it could not do so.[6]

There is no basis for delegating to Article III courts the difficult task of deciding who should be admitted to a college or university. Federal courts cannot effectively "evaluate the substance of the multitude of academic decisions that are made daily by faculty members" in the area of admissions, a dynamic that is different within each institution and involves numerous factors. As even Petitioners recognize, the "range of factors that a university may constitutionally consider in selecting its students . . . is virtually infinite," Gratz Br. at 37, and "there is no limit to the viewpoints, perspectives, ideas, character traits, talents, and experiences that a university might consider in assembling its community," *id.*

Nevertheless, Petitioners want this Court to "evaluate the substance" of college and university admissions policies and rule them invalid because they are "notoriously ill-defined," Grutter Br. at 31, "nebulous," *id.* at 16, "lacking in objective, ascertainable standards," *id.* at 17, and "with at least as many varied possibilities and standards of application as there are institutions to define it," *id.* at 19. Petitioners miss the point. Federal courts have not and do not make these kinds of determinations. These are quintessentially "academic decisions" to be made by educators, not courts. Nothing in this Court's rulings suggests otherwise.

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[6] In fact, in its most significant ruling on this issue since *Ewing*, this Court expressly stated: "Nothing we say today should be understood as a retreat from this principle of respect for *legitimate* academic decisionmaking." *Univ. of Pennsylvania*, 493 U.S. at 199.

II. THIS COURT SHOULD REAFFIRM JUSTICE POWELL's *BAKKE* OPINION.

There is no better constitutional calculus for determining how this Court should proceed than Justice Powell's opinion in *Bakke*. Justice Powell recognized that this Court's long-standing commitment to limit judicial intrusion into academic affairs cautioned against adopting a sweeping rule, such as the one Petitioners propose here. As Justice Powell rightly observed, this Court's role should be limited to ensuring that each applicant's qualifications are considered. The Equal Protection Clause of the Fourteenth Amendment requires nothing more. While Petitioners go to great lengths to disparage it, Justice Powell's opinion, both in theory and in practice, fully comports with this Court's most recent pronouncements.

Petitioners endeavor to paint Justice Powell's *Bakke* opinion as an aberration. In their view, this Court has already "rejected significant parts of Justice Powell's analysis." Gratz Br. at 37. In particular, they argue that even though Justice Powell unequivocally rejected the use of quotas or set-asides in university admissions, his refusal to find a "facial intent to discriminate" when admissions processes merely allow race to be considered as one factor among many runs afoul of decisions requiring strict scrutiny of *any* consideration of race. *See id.* at 38. Similarly, Petitioners characterize Justice Powell's presumption of good faith on the part of university administrators who allow race to be considered in admissions decisions as inconsistent with the "bedrock proposition" that all uses of race deserve strict scrutiny. *Id.* at 38-39 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223-24 (1995); *Croson*, 488 U.S. at 500). Petitioners' view of Justice Powell's reasoning in *Bakke* utterly misconstrues his

measured opinion as well as this Court's subsequent rulings.

From the outset of his opinion, Justice Powell adopted the very interpretation of the Fourteenth Amendment here urged by Petitioners: that the Amendment applies to all citizens, white or minority. *See Bakke*, 438 U.S. at 295 (Powell, J.) ("The clock of our liberties . . . cannot be turned back to 1868. It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.") (citations omitted). Indeed, Justice Powell emphatically rejected the notion that this Court – or any court – could apply a "sliding scale" necessary for determining what groups were to be accorded varying levels of protection at a given time. *See id.* at 297. Instead, Justice Powell adhered to the "bedrock principle" that "it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a *particular* group." *Id.* at 299 (emphasis added).

It was in this context that Justice Powell adopted the distinction, so derided by Petitioners, between a set-aside program such as the one in operation at the University of California at Davis in *Bakke* and an admissions policy that considers race as but one of the many factors at play for any given applicant. For as Justice Powell recognized, considering race as a "plus" for minority applicants does not foreclose any white applicant from entry to a university, because all applicants would receive consideration in the process. "The applicant who loses out on the last available seat to another candidate receiving a 'plus' on

the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color. . . . " *Id.* at 318. Indeed, such could not be the case where, absent an explicit set-aside, *any* white student had been admitted. Instead, it was the fact that the rejected applicant's "combined qualifications . . . weighed fairly and competitively" did not warrant admission, "and he would have no basis to complain of unequal treatment under the Fourteenth Amendment." *Id.* In other words, where a university could show that it considers all applicants individually, without setting aside certain seats for minorities, and considers race as merely one factor among many for admission, *no one* member of any particular group can complain of any Fourteenth Amendment violation where any members of that group are admitted.

Again contrary to Petitioners' argument and as discussed above, this aspect of Justice Powell's opinion is not an aberration, but coheres with this Court's holdings in other contexts involving race. *See Miller*, 515 U.S. at 915-17 (refusing to apply strict scrutiny where race was not predominant factor in drawing district boundaries). In fact, in holding that "until a claimant makes a showing sufficient to support that allegation the *good faith* of a state legislature must be presumed," *id.* at 915 (emphasis added), the *Miller* Court relied on Justice Powell's opinion in *Bakke*, *see id.* (citing *Bakke*, 438 U.S. at 318-19 (Powell, J.)). As applied here, either *all* white applicants to the University of Michigan are able to compete for certain spots in a class, or they are not. But where multiple factors, objective and nonobjective, are at play in that decision and its outcome is contingent on an individual's

own circumstances, race cannot be a predominant factor, and strict scrutiny just simply does not apply.

Though Petitioners belittle his commitment to academic freedom, Justice Powell has struck a balance between equal protection, academic freedom, and judicial competence that Petitioners seek to obliterate. Yet, this Court has expressly rejected the notion that it – or any federal court – has the institutional expertise necessary to second-guess the complex decisions made by academics in determining the contours and composition of their academic communities. *See Ewing*, 474 U.S. at 225-26.

Finally, and again contrary to Petitioners' assertions, this Court has relied upon the reasoning contained in Justice Powell's opinion, even if it has not recognized it as a holding. In *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), the Court applied Justice Powell's analysis to uphold the agency's employment policy, which accounted for an applicant's sex as but one of many factors in the hiring decision:

> As the Agency Director testified, the sex of Joyce was but one of numerous factors he took into account in arriving at his decision. The Plan thus resembles the 'Harvard Plan' approvingly noted by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265, 316-319 (1978), which considers race along with other criteria in determining admission to the college. As Justice Powell observed: "In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. *Id.* at 317. Similarly, the Agency Plan requires women to compete with all other qualified

> applicants. *No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants.

480 U.S. at 638; *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.") (O'Connor, J., concurring in part and concurring in judgment). This repeated recognition, if not outright adoption, of Justice Powell's principles is a testament to their continuing relevance on this issue and to this case.

In the end, Justice Powell's opinion succeeds in providing guidance to colleges and universities as to how they can conduct admissions programs without fear of incurring a spate of annual race-based legal challenges to their admissions decisions, and without having to engage in a prophylactic refusal to consider qualified minority candidates with "objective" scores on the arguable margin of their applicant pools. By allowing schools to consider race as one factor among many, Justice Powell's *Bakke* rule thus ensures that schools can conduct their admissions procedures free from undue judicial interference, and that race does not predominate in those procedures. This Court's Fourteenth Amendment jurisprudence would be served well by reaffirming those principles and that opinion here.

CONCLUSION

The judgments of the Court of Appeals in the *Grutter* case and the District Court in the *Gratz* case should be affirmed.

Respectfully submitted,

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